No. 89-984

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

BUCKLEY LAND CORPORATION,

Petitioner,

v

DEPARTMENT OF NATURAL RESOURCES,
a Department of the State of Michigan,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether deference should be given to a Michigan Court appellate decision which found that Petitioner's challenge to title to real property held by the State of Michigan under a 1940 tax sale based on a statutory procedure constitutional at the time and found to be unconstitutional in 1976, is circumscribed by the state's rule of limited retroactivity of judicial decision and the statute of limitation?

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The Order of the Michigan Supreme Court entered on September 26, 1989, denying Petitioner's Application For Leave To Appeal the opinion of the Michigan Court of Appeals is reported at 433 Mich. 875 (1989), and appears in Petitioner's Appendix D beginning at page D-1.

The opinion of the Michigan Court of Appeals entered on February 28, 1989, in favor of Respondent and affirming the decision of the Ingham County Circuit Court is reported at 178 Mich. App. 249; 443 N.W.2d 390 (1989), and appears in Petitioner's Appendix A, beginning at page A-1. The opinion and conclusions of the Ingham County Circuit Court appear in Petitioner's Appendix B beginning at page B-1. The Order of the Ingham County

Circuit Court entered on September 28, 1987, appears in Petitioner's Appendix C beginning at page C-1 and is not reported.

JURISDICTION

The Michigan Court of Appeals issued its Opinion and Judgment on February 28, 1989 (Petitioner's Appendix A, beginning at page A-1). On March 20, 1989, Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court. The Supreme Court entered an Order denying the Application on September 26, 1989. The Order is reprinted in Petitioner's Appendix D, beginning at page D-1.

Petitioner asserts that the jurisdiction of this Court to review the Opinion

and Judgment of the Court of Appeals of the State of Michigan is, and can be invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The Michigan statutes involved are set forth in Petitioner's Appendix E beginning at page E-1. They are:

1893 P.A. 206, § 60, et. seq.; M.C.L. 211.60 et. seq.; M.S.A. 7.104, et. seq. Michigan General Property Tax Act

1961 P.A. 236, § 5801; M.C.L. 600.5801; M.S.A. 27A.5801

STATEMENT OF CASE

Edward Buckley acquired the land at issue, for its timber, by land contract in 1891, at a price of $7,000.00. Mr. Buckley died on August 27, 1927. All residual real property was transferred to Oscar Larson and Virginia Buckley Cook, Trustees, pursuant to a Manistee County Michigan Probate Court Order Assigning Residue, recorded February 20, 1931.

The property taxes were unpaid in 1937 and previous years and thus, the Auditor General of Michigan submitted a Petition for Sale of Lands to the respective State Circuit Courts on January 17, 1940. Proof of Publication was submitted to the Courts on March 20, 1940. In accordance with the Michigan General Property Tax Act, on April 2, 1940, the

respective Circuit Courts then issued an Order requiring the lands to be sold at auction, and if there be no bidders, to be bid into the State for unpaid taxes and the lien cancelled. Pursuant thereto, the property was bid into the State and a deed from the Auditor General, vesting absolute title in the State, was recorded on the 23rd day of June, 1942.

The properties have been leased on many occasions by the State for the exploration, production and development of oil and gas and have also been used for tourism and outdoor recreation. The lands have greatly increased in value.

On January 12, 1971, the Manistee County Probate Court issued a Supplemental Order of Distribution

dissolving the Buckley estate, and ordering as follows:

> "IT IS, THEREFORE, ORDERED that any right, title and interest of any nature and kind which this estate may have owned on November 30, 1970, the date of termination of the Trust under the Last Will and Testament of Edward Buckley, Deceased, in and to the several parcels of real estate identified and described on the schedule entitled Buckley Real Estate attached hereto, shall be deemed to have passed pursuant to that trust instrument and vested in ownership on that date unto the following beneficiaries: An undivided one-third interest therein unto Harold O. Larson of 1152 Glorietta, Coronado, California; An undivided one-third interest therein unto Edward L. Larson of P.O. Box 1058, Grand Rapids, Michigan; An undivided one-sixth interest therein unto Joan H. Jones of 1515 Normandy, Ann Arbor, Michigan; An undivided one-sixth interest therein unto James L. Howlett of 74 W. Long Lake Road, Bloomfield Hills, Michigan." (emphasis added)

Those heirs and beneficiaries then quit-claimed their interest to the Buckley

Land Corporation (Petitioner herein Plaintiff-Appellant below), on February 1, 1971. The Quit-Claim Deeds of each beneficiary contained the following qualifying language:

> "This deed is intended to convey to the grantee whatever interest in the premises may have been owned by the Estate of Edward Buckley, Deceased, and distributed to the Grantor by order of the Manistee County Probate Court dated January 12, 1971, in matter number 269-E."
> (emphasis added)

The address given on each Quit-Claim Deed for the Buckley Land Corporation was for the law office of Hartman, Beier, Howlett, McConnell and Googasian, the law firm which drafted the Supplemental Order of Distribution for the estate. Consideration of one dollar was paid by Appellant to each beneficiary in exchange for the quit-claim deed.

This lawsuit was not filed until August 20, 1985, some 14½ years after the property interests passed to Petitioner Buckley Land Corporation.

Respondent generally accepts Petitioner's Statement of the Case, but would supplement as follows: Ingham County Circuit Court in Michigan, the trial court, in issuing its bench opinion, also granted Defendant-Appellee's Motion for Summary Disposition based on Golden v. Auditor General, 373 Mich. 664; 131 N.W.2d 55 (1964) and Longyear v. Toolan, 209 U.S. 414; 28 S.Ct. 506; 52 L. Ed. 2d 859 (1908). The court only refused to give Dow v. State of Michigan, 396 Mich. 192; 240 N.W.2d 450 (1976) full retroactive effect and found that the ten-year statute of limitations, M.C.L.

600.5801; M.S.A. 27A.5801, barred Petitioner's claim.

On February 28, 1989, the Michigan Court of Appeals affirmed the trial court's decision and found that the claim of Petitioner was barred by the 10-year statute of limitations, under M.C.L. 600.5801; M.S.A. 27A.5801, that the 1942 tax deed were prima facie valid and determined that the statute of limitations began to run at the time of the 1942 tax deeds. Therefore, upon completion of the 10-year period, the State's title was no longer open to question.

Further, the Michigan Court of Appeals agreed with the trial court in applying only limited retroactive effect to the Dow decision. Under Michigan law, limited retroactivity applies to parties

before the court and to pending cases. Tebo v. Havlik, 418 Mich. 350, 360-361; 343 N.W.2d 181 (1984), reh. den. 419 Mich. 1201 (1984). Hence, the Michigan Court of Appeals declined to apply Dow, supra, retroactively to a transaction which occurred over 40 years ago. It is true that under today's standard notice of a tax sale is constitutionally defective if merely given by publication in the county where the property is situated, and tax deeds issuing from defective tax sales are deemed void under Dow, supra. However, that standard did not apply in 1940 at the time of sale to the State of Michigan. In fact, the county-publication notice procedures then in use were validated by the Michigan Supreme Court in 1964. Golden, supra.

On March 20, 1989, Plaintiff-Appellant filed its application for Leave to Appeal, and Brief in Support thereto. On April 11, 1989, Defendant-Appellee filed its Response in Opposition to Leave to Appeal and Brief in Support. The Order of the Michigan Supreme Court was entered on September 26, 1989. In this Order, the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal the opinion and judgment of the Michigan Court of Appeals indicating that the Court was not persuaded that the questions presented should be reviewed by the Court.

REASONS FOR DENYING THE WRIT

I

THE STATUTE OF LIMITATIONS QUESTION RAISED IN THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT AN IMPORTANT FEDERAL CONSTITUTIONAL QUESTION.

The property at issue reverted to the State in 1940. Notice of tax sale by publication was constitutional at the time of the tax sale. The trial court record shows that the property taxes were not paid in 1937 and have not been paid since 1937. Pursuant to the General Property Tax Act, M.C.L. 211.60, et. seq.; M.S.A. 7.104, et. seq., the property was deeded to the State in 1940. Notice by publication alone was the statutorily prescribed procedure at that time. The constitutionality of notice by publication alone was upheld in 1964. Golden v.

Auditor General, 373 Mich. 664; 131 N.W.2d 55 (1964). Moreover, the procedure was upheld in a decision which preceded the 1940 tax sale. Longyear v. Toolan, 209 U.S. 414; 28 S.Ct. 56; 52 L. Ed. 859 (1908).

The estate of Edward Buckley, which had been created in 1931, was terminated in November of 1970. The real estate was distributed to the remaining beneficiaries in January, 1971. Those beneficiaries quit-claimed any and all interests that they may have had on February 18, 1971, to the Buckley Land Corporation.

It was not until April 1, 1976, that the Michigan Supreme Court decided Dow v. State of Michigan, 396 Mich. 192; 240 N.W.2d 450 (1976), and ruled that notice

by publication alone was insufficient to notify an owner of an interest in real property of an impending tax sale. However, regarding retroactivity, neither Dow, supra, nor any of the subsequent Michigan Court of Appeals cases applying or interpreting Dow, have given the Dow ruling on notice, as a matter of law, complete retroactivity. Here, the Buckley Land Corporation did not bring this suit until August 20, 1985, over 40 years after notice of the tax sale which resulted in the lands being bid into the state.

In addition, as to timeliness, the trial court found as a matter of state law that the action was time-barred and that more than 10 years had elapsed since the property was deeded in this matter.

On the basis of state law, the Michigan Court of Appeals affirmed the trial court and found that the claims of Petitioner were barred by the 10-year statute of limitations found in M.C.L. 600.5801; M.S.A. 27A.5801, and determined that the statute of limitations began to run at the time of the tax deeds in 1942. Buckley Land Corporation v. Department of Natural Resources, 178 Mich. App. 249; 443 N.W.2d 390 (1989).

Petitioner erroneously relies upon Schroeder v. City of New York, 371 U.S. 208; 83 S.Ct. 279; 9 L. Ed. 2d 255 (1962), to support claims that an alleged lack of constitutionally valid notice would preclude the running of the statute of limitations for an adverse possession claim.

Schroeder, supra, involved an attempt by New York City to acquire the right to divert water from a river that flowed through Mrs. Schroeder's land. Notice of the city's acquisition was published in several newspapers with limited circulations and notices were posted on trees along the river. Neither the newspapers nor the notices carried Mrs. Schroeder's name and no notices were posted on her land.

The distinction in the subject case is that notice procedure was constitutional at all pertinent times relevant to this matter. The notice by publication procedure was considered constitutional and valid in 1940 at the time of sale to the State of Michigan based upon Longyear, supra, and the county-

publication notice procedures then in use were subsequently validated by the Michigan Supreme Court in Golden, supra, in 1964, twenty-four years after the time of sale to the State. The United States Supreme Court in Schroeder ruled a New York notice statute to be unconstitutional in response to Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The tax sale at issue in this matter predates Mullane by ten years.

Petitioner has failed to establish that the considerations expressed in United States Supreme Court Rule 10 apply in this case. Petitioner has not raised issues of sufficient significance to federal jurisprudence to warrant granting certiorari. Nor have they raised any important questions of federal

law which would warrant this Court granting the petition of certiorari to the Michigan Supreme Court.

In summary, dual considerations underlie a denial of the writ and is especially true of petitions for review on writ of certiorari to a State court. In this matter, review is sought too late as a matter of the state statute of limitations and the decision is supportable as a matter of State law, and is therefore not subject to review by this Court.

II

THE STATE COURT DECISION RELATIVE TO THE LIMITED RETROACTIVITY OF DOW v. STATE OF MICHIGAN AND THE APPLICABLE STATUTE OF LIMITATIONS WAS PROPER AND SUPPORTABLE AS A MATTER OF STATE LAW AND JURISDICTION, AND THEREFORE THE UNITED STATES SUPREME COURT SHOULD NOT REVIEW THE STATE COURT JUDGMENT.

A. THE TRIAL COURT AND COURT OF APPEALS CORRECTLY HELD THAT DOW v. MICHIGAN SHOULD BE GIVEN ONLY LIMITED RETROACTIVITY.

Respondent asserted below, and the trial court specifically ruled, that Dow v. State of Michigan, 396 Mich. 192; 240 N.W.2d 450 (1976), should be given limited retroactivity, not full retroactivity, as Petitioner had urged.

The Michigan Supreme Court in Tebo v. Havlik, 418 Mich. 350, (1984); reh. den. 419 Mich. 1201 (1984), set forth the standard for retroactivity in Michigan jurisprudence. The Court specifically

cautioned against the so-called rule of full retroactivity.

The Court stated:

> "It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of the circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result."
>
> * * *
>
> "Appreciation of the effect a change in settled law can have has led this Court to favor only limited retroactivity when overruling prior law." Tebo at 360.

From the above-quoted passage, it is evident that, since 1984, contrary to Petitioner's assertion, the Michigan Supreme Court has made it clear that it has NOT embraced full retroactivity.

Instead, the Supreme Court favors limited retroactivity, while considering the issue on an individual case basis. Limited retroactivity is prescribed where:

a) Vested property rights are involved;

b) Substantial impact on public bodies will occur;

c) There is substantial reliance on the old rule (or "justified reliance", see fn 4, 418 Mich. at 363); and

d) There is potential for "chaos" in enforcement of law, or "appreciation of the effect of a change in settled law". Id.

The Court of Appeals has followed the Supreme Court's admonition in the application of retroactivity. In Faigenbaum v. Oakland Medical Center, 143 Mich. App. 303; at 312-313; 373 N.W.2d 161 (1985) and King v. General Motors Corporation,

136 Mich. App. 301; at 306; 356 N.W.2d 626 (1984), the Michigan Court of Appeals attempted to synthesize the standard for limited retroactivity to a consideration of the following: 1) The purpose of the new rule; 2) The general reliance upon the old rule; and 3) The effect of retroactive application of the new rule on the administration of justice. As discussed below, application of these factors to the retroactive effect of the Dow decision on the General Property Tax Act of 1893 lends only to a conclusion of limited retroactivity.

Further, it should be noted that in Shavers v. Attorney General, 402 Mich. 554; 267 N.W.2d 72 (1978), the Court held portions of the no-fault motor vehicle insurance act constitutionally deficient

in failing to provide due process, but ordered its decision to be effective 18 months from the date of the decision to give the legislature and the state insurance commissioner time to remedy the act's deficiencies. The Court was hesitant to invoke retroactivity so it made its decision prospective. Thus, Petitioner's claim that all decisions holding a statute to be unconstitutional are given complete retroactivity is not true in the State of Michigan, since Shavers was completely prospective.

Petitioner has conceded that Faigenbaum sets forth or synthesizes a standard for limited retroactivity, but argues that such a standard is inapplicable to decisions which hold a statute unconstitutional. Petitioner improperly

relies on Gallego v. Glasser Crandell Co., 388 Mich. 654; 202 N.W.2d 786 (1972) and Stanton v. Lloyd Hammond Produce Farms, 400 Mich. 135; 253 N.W.2d 114 (1977), for the position that decisions declaring statutes unconstitutional are always accorded full retroactivity. While the Supreme Court appeared to favor full retroactivity in those cases, its ruling in Tebo has changed that preference. Petitioner ignores the later Michigan Supreme Court proclamation in Tebo, supra, that the Court "favor[s] only limited retroactivity when overruling prior law." Petitioner also ignores the Supreme Court's discussion in Stanton which states:

> "We are not unmindful that certain factual circumstances might warrant the retroactive application of an unconstitutional statute. In Dearborn Fire Fighters Union Local No. 412, IAFF v Dearborn, 394 Mich

> 299; 231 NW2d 226 (1975), Justice Levin, citing Lemon v Kutzman, supra, wrote that '[d]ecisions holding legislative acts unconstitutional have, on occasion been given limited retroactivity in recognition of the necessities of governmental administration." Stanton, supra, at page 147. (emphasis added and in original)

The Ccurt in Dow, did not address the issue of whether the decision was to be given prospective or retroactive application. Thus, even before the limited retroactivity standard in Tebo and Faigenbaum, the Courts were moving towards limited retroactivity for all decisions overruling prior law, including those rendering a statute unconstitutional.

Petitioner has relied upon Fladger v. Detroit Non-Profit Housing Corp, (Court of Appeals No. 25642, decided

November 29, 1976), an unpublished, non-binding opinion. The plaintiff therein filed its Complaint in 1972, and the Court of Appeals issued its opinion in 1976, after Dow had been decided and released. Thus, Fladger is only an example of limited retroactivity since it was pending at the time of the Dow decision.

Similarly, in Luster v. Bank of Chelsea, 730 P. 2d 506 (Okla, 1986), a case cited by Petitioner in the courts below, a quiet title action brought by a tax sale purchaser which involved the issue of adequacy of notice by publication was filed in 1981, then the U. S. Supreme Court issued Mennonite Board of Missions v. Adams, 462 U.S. 791; 103 S.Ct. 2706; 77 L. Ed. 2d 180 (1983), and

thereafter the Oklahoma Supreme Court followed the Mennonite decision in 1986. Though the state limitations period had expired, Luster represents an instance of limited retroactivity since the Oklahoma Supreme Court merely applied a decision from the U. S. Supreme Court which was released during the pendency of the litigation. It is important to note that the Mennonite decision was given limited retroactivity only, even though it involved a determination that notice by posting and publication was unconstitutional, a decision almost identical to Dow.

Clearly, limited retroactivity is not only allowed but is the preferred rule in this matter. Presuming, arguendo, that such is not the case, Petitioner's logic

would suggest that the Michigan Supreme Court, although never specifically so stating, intended that its Dow decision in 1976, would have effect back to enactment of the General Property Tax law in 1893. Such a suggestion is ludicrous in that it would disrupt the record of title as well as the interests of, and even the very lives of, all individuals possessing such property, as well as all property, that at some point in the last 90 years, had been subject to tax-reversion proceedings. As a result, the chaos that would result in the 82 various offices of the County Registers of Deeds and County Treasurers of this state, countless title companies, realtors, oil, gas and mining corporations, as well as the common landowners of the State of Michigan, is incalculable.

The results of full retroactivity of Dow, thereby voiding every tax sale and tax deed back to 1893, would be chaotic. Vested real property rights would be lost or disrupted; millions of dollars from sale or lease of property would be lost to the State; the respective county treasurers would have to review all past tax sales; every drilling unit now producing oil or gas which underlies any State land would be subject to extensive litigation; our State forests, campgrounds and parks could be almost eliminated. The effect upon the settled law, on property rights, and State and local governing bodies would be of such magnitude, that only limited retroactivity of the Dow case is appropriate.

Dow has not, and should not, be applied with full retroactivity. In

holding that Dow should be given limited retroactivity, the circuit court specifically considered the possibility of "unfettered chaos" from full retroactivity, in its Opinion, and the Court of Appeals properly affirmed.

It is noteworthy that the United States Supreme Court has endorsed departures from the ordinary retroactivity rule. Linkletter v. Walker, 381 U.S. 618; 85 S.Ct. 1731; 14 L. Ed. 2d 601 (1965). In Linkletter, supra, a state criminal habeas corpus case, the Court announced that "the Constitution neither prohibits nor requires retrospective effect" for new rulings. The proper approach was to "weigh the merits and demerits" of retroactivity in each case "by looking to the prior history of the

rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." In Linkletter, involving a split between the various Courts of Appeals on the issue of retrospective operation of a United States Supreme Court decision that unconstitutionally seized evidence is not admissible in state courts, the United States Supreme Court in rejecting full retroactivity, did not require "pure prospectivity": the new constitutional requirements were applied to all cases still pending on direct review at the time the new rule was announced.

Stovall v. Denno, 388 U.S. 293; 87 S.Ct. 1967; 18 L. Ed. 2d (1967), another criminal due process case, articulated more fully the criteria on retroactivity

which includes the extent of the reliance by law enforcement authorities on the old standards, and "the effect on the administration of justice of a retroactive application of the new standards."

Since retroactive application "... is not compelled, constitutionally or otherwise, Solem v. Stames, 465 U.S. 638, 642 (1984), a state "... in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward". Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932).

Because, as the trial court and the Court of Appeals have held, the Michigan Supreme Court favors limited retroactivity, and due to the potentially severe

effect on state and local government, as well as private property owners, if given full retroactivity, the decision of the trial court, as affirmed by the Court of Appeals, to apply Dow with limited retroactivity is proper. The Petition for Writ of Certiorari to the Supreme Court of Michigan should be denied.

B. EVEN IF GIVEN FULL RETROACTIVE EFFECT, DOW WOULD NOT BE APPLICABLE PRIOR TO THE MICHIGAN SUPREME COURT DECISION IN GOLDEN, IN 1964, UPHOLDING NOTICE BY PUBLICATION.

Notice of tax sale by publication was constitutional at the time of the tax sale in this case. The property taxes have not been paid since 1937 and, pursuant to the General Property Tax Act, the property was deeded into the State in 1940. Petitioner argued below that the

General Property Tax Act was declared unconstitutional in Dow v. State of Michigan, 396 Mich. 192; 240 N.W.2d 450 (1976). Nothing could be further from the truth. The Michigan Supreme Court actually held in Dow as follows:

> "Personal service is not required. Notice by mail is adequate. Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice. Mailing should be by registered or certified mail, return receipt requested, both because of the greater care in delivery and because of the record of mailing and receipt or non-receipt provided. Such would be the efforts one desirous of actually informing another might reasonably employ. If the state exerts reasonable efforts, then failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period." Id., at 211.

In Dow, supra, the Michigan Supreme Court ruled that notice by publication alone

was insufficient to notify an owner of an interest in real property of an impending tax sale. It should be noted that the Supreme Court specifically held that the State only need exert "reasonable efforts" towards ascertaining all owners of an interest in real property; it was not necessary to effectuate actual notice. Further, the Court notes therein that "reasonable efforts" would be presumed to have been expended, if the State gave notice to all parties whose interests were recorded with the Register of Deeds or those of whom the county assessor or treasurer had actual knowledge.

Nowhere in Dow, supra, nor in any of the subsequent Court of Appeals cases applying or interpreting Dow, does it

specifically order that the holding be given blanket retroactivity. To do so would require that notice by certified mail be made to all owners of an interest in any property anywhere in the State for which the taxes have been delinquent from 1976 back to 1893 when the General Property Tax Act was passed. Such a determination would result in utter chaos and would remove any consistency or finality to tax judgments at any time in the past, as the Court logically would have had to rule that all redemption periods were still open.

The effect of Dow was to overrule the previous holding of the Michigan Supreme Court in Golden v. Auditor General, 373 Mich. 664; 131 N.W.2d 55 (1964). In that case, in 1964, the Supreme Court had spe-

cifically upheld the constitutionality of notice by publication, only.

In Golden, the Michigan Supreme Court upheld the "caretaker theory" which held that a property owner was imputed knowledge of the necessity of payment of property taxes, and is expected to exercise due diligence therein. As noted in Golden, Michigan's statutory provision for notice by publication in tax foreclosure proceedings was sustained against a due process challenge by the United States Supreme Court in Longyear v. Toolan, 209 U.S. 414; 28 S.Ct. 506; 52 L. Ed. 2d 859 (1908). Golden, then, in 1964, reaffirmed the constitutionality of notice by publication. During the period of the tax sale, and the redemption period thereafter, in this cause, the

State of Michigan gave the statutorily-prescribed notice, and protected Petitioner's constitutional rights.

Further, in this case, it is certainly expected that the trustees of an estate, as fiduciaries, would exercise due diligence as required by Golden, as to all claims against the trust properties whether raised by a government agency or private persons. However, Petitioner has readily admitted that there was no activity involving the properties from the "Probate Court Order Assigning Residue" of February 20, 1931, until the "Supplemental Order of Distribution" on February 25, 1971.

As Petitioner admits, Respondent State of Michigan did give notice by publication of all lands at issue.

Notice by publication was specifically upheld as constitutional by the U. S. Supreme Court in 1908 and then by the Michigan Supreme Court in November, 1964. Petitioner's predecessor in title having failed to exercise due diligence in paying their taxes, they cannot now be heard more than 40 years later to complain of the insufficiency of notice.

The trial court, relying upon the decisions of the U. S. Supreme Court and Michigan Supreme Court that were in effect at the time of the tax sale, ruled that the tax sale at issue was proper and constitutional.

The property at issue reverted to the State in 1940. Golden, supra, upheld the constitutionality of notice by publication alone, in 1964. The estate's bene-

ficial interest passed by quit-claim deed to Petitioner in 1972. Dow was not decided until 1976. The trial court and Court of Appeals quite properly ruled that at all times pertinent, notice by publication was constitutional, and the tax sale proper.

C. THE TRIAL COURT PROPERLY RULED AND THE COURT OF APPEALS AFFIRMED THAT APPELLANT'S CLAIMS ARE BARRED BY M.C.L. 600.5801.

M.C.L. 600.5801 provides in pertinent part:

> "No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.
>
> * * *
>
> "When the defendant claims title under some deed made by an officer of this state or of the United States

> who is authorized to make deeds upon the sale of lands for taxes assessed and levied within this state the period of limitation is 10 years."

Petitioner admitted that Respondent became owner of said real property in 1938, pursuant to a judgment of tax foreclosure. The appropriate statute of limitations provides that any action by a plaintiff seeking recovery of property where the defendant claims title through a tax deed must be brought within 10 years of the time defendant claims title. Thus, in this case, Petitioner's claim has been barred for over 40 years.

The trial court ruled, based on the above, that Petitioner's claims were "time-barred" since over 10 years had elapsed since the State took possession and title to the property.

Petitioner addresses this issue only briefly, at page 11 of its petition, but concedes that this "appears" to be the correct statute of limitations. Petitioner contends, however, that the ten-year statute of limitations only begins to run after the date of the Dow, supra, decision. Although not discussed in any detail, Petitioner seems to be relying on Herrick v. Taylor, 113 Mich. App. 370; 317 N.W.2d 631 (1982), for that contention. Scrutiny of the relevant dates in Herrick, indicates the dissimilarity between that case and the present case. In Herrick, a passenger was injured in an automobile accident which occurred on May 1, 1974. The guest passenger statute, M.C.L. 257.401; M.S.A. 9.1201, was ruled unconstitutional in Manistee Bank and Trust Company v.

McGowan, 394 Mich. 655; 232 N.W.2d 636 (1975), on September 8, 1975. Herrick filed his Complaint on May 17, 1977, some sixteen days past the three-year statute of limitations. The Michigan Court of Appeals in Herrick ruled that the statute of limitations continued, but only because the statute of limitations had not run at the time of the Manistee decision.

In Herrick, the Court had to struggle to reach an equitable result, and to shift the commencement of the statute of limitations to the decisional date of Manistee Bank. In so doing, the Court attempted to distinguish Bauman v. Grand Trunk Western Railroad Company, 41 Mich. App. 611; 200 N.W.2d 444 (1972), lv. den. 388 Mich. 793 (1972).

Bauman leaves no doubt but that the general rule is that the statute of limitations continues to commence from the date of injury, notwithstanding an intervening decision overruling or changing prior law. As stated above, in Herrick, the statute of limitations was only extended because the intervening decision occurred during the original period for bringing a claim. Neither situation can be claimed by Petitioner. Under the applicable statute of limitations, M.C.L. 600.5801; M.S.A. 27A.5801, the claim accrues from the time the State claimed title under tax-reversion proceedings. Thus, Petitioner's claim commenced in 1938 or 1940, and was barred after 1950. It is interesting to note that Petitioner's claim would be barred even if the statute provided that the claim

accrued through its predecessor in title, since Petitioner took by quit-claim deed in 1972 and did not bring this action until 1985.

Petitioner's argument at page 11 of its petition that it, and all persons similarly situated, should have ten years to file their claim, beginning on April 1, 1976, the date Dow was decided, is not supported by Herrick or any other decision. Petitioner is contending that this Court should hold that all persons whose property reverted to the State, after non-payment of taxes and notice of tax foreclosure proceedings by publication only, between 1893, when the General Property Tax Act was enacted and 1976, when Dow ruled notice by publication only unconstitutional, should have until 1986

to file a claim for unjust enrichment or to quiet title. Petitioner's assertion that such a decision would not "open the flood gates of tax deed litigation", because it was the only claimant to discover this statute of limitation, underscores the fallacy in their argument since the purposes of a statute of limitation are not served where potential claimants are unaware of the time period for filing a claim.

Petitioner's assertion that the statute of limitations does not commence until 38 years after the State took title ignores the policy reasons for a statute of limitations. As set forth in Bigelow v. Walraven, 392 Mich. 566, 576; 221 N.W.2d 328 (1974):

> "'Statutes of limitations are intended to "compel the exercise of a right of action within a reasonable

> time so that the opposing party has a fair opportunity to defend"; "to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured"; and to protect "potential defendants from protracted fear of litigation".'" Id., at 576.

When applying these principles to the instant case, the State would submit that the claims are, indeed, stale, that it may be impossible to divine the facts at issue, and that the State would not be able to fully and fairly defend against these claims, at this late date. A review of the pleadings evidences the parties' unsuccessful efforts at discovering the disposition of all the parcels of property.

In the instant case, the Michigan Court of Appeals was correct in its Opinion when it determined as follows:

> "The State complied with existing procedures for the tax sales, which procedures were deemed proper until Golden, supra was overruled by Dow, supra, some 34 years after the tax sales occurred. Because the tax deeds of 1942 were prima facie valid, the 10-year limitations period began running at that time. MCL 600.5801; MSA 27A.5801. See also Fitschen v Olson, 155 Mich 320, 323-324; 119 NW2d 3 (1909). Upon completion of the 10-year period, the State's title was no longer open to question. See Toll v Wright, 37 Mich. 93 (1877)."

Petitioner's claim that the statute of limitations does not commence until 1976 based upon the decisional date of Dow, even though the State took title in 1940, is illogical, inconceivable in light of the policy reasons for a statute of limitations, and unsupported by the case law.

It should be noted that the defenses of res judicata, laches, adverse possession and the Marketable Record

Title Act, M.C.L. 565.101, et seq.; M.S.A. 26.1271, et seq., were never ruled upon by the trial court. However, the issues of res judicata and laches were briefed before the circuit court.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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